Canadian Human Rights Tribunal

Performance Report

For the period ending March 31, 2001

Anne McLellan
Minister of Justice

Table of Contents

Chairperson's Message

The past year has been another busy one for the Canadian Human Rights Tribunal. The transition from the old Human Rights Tribunal to the restructured Canadian Human Rights Tribunal is now complete, and the new Tribunal is functioning smoothly.

The 1998 amendments to the *Canadian Human Rights Act* empowered the Tribunal Chairperson to develop rules of procedure. Draft rules were developed, and have been in use for approximately eighteen months. By all accounts, these rules are working well, and steps will be taken in the near future to formalize the rules through the regulatory process.

One of the most significant challenges for the Tribunal over the last year has been the significant increase in the number of cases referred for hearing by the Canadian Human Rights Commission. This increase in our case load has placed a significant burden on both the human and financial resources of the Tribunal. We have thus far been able to manage the increased workload within our existing budget. However, as our inventory of cases continues to increase, additional resources will be required if we are to be able to maintain the existing level of service to Canadians.

Anne L. Mactavish

Context

The Canadian Human Rights Tribunal (CHRT) is a quasi-judicial body that hears complaints of discrimination referred to it by the Canadian Human Rights Commission (CHRC) and determines whether the activities complained of violate the *Canadian Human Rights Act* (CHRA). The purpose of the Act is to protect individuals from discrimination and to promote equal opportunity. The Tribunal is the only entity that may legally decide whether a person has contravened the Act.

The Act applies to federal government departments and agencies, Crown corporations, chartered banks, railways, airlines, telecommunications and broadcasting organizations, and shipping and inter-provincial trucking companies. Complaints may relate to discrimination in employment or in the provision of goods, services, facilities and accommodation that are customarily available to the general public. The CHRA prohibits discrimination on the basis of race, national or ethnic origin, colour, religion, age, sex, marital status, family status, sexual orientation, disability or conviction for which a pardon has been granted. Complaints of discrimination based on sex include allegations of wage disparity between men and women performing work of equal value in the same establishment.

As previously reported, the CHRT expected the transformations envisaged by Bill S-5 to take three years to realize. Implementation of a new structure and revised operating procedures has progressed more quickly than planned and appear to be meeting the needs of clientele. Operating procedures are reviewed and changes are made as required to ensure that those needs are always the first priority.

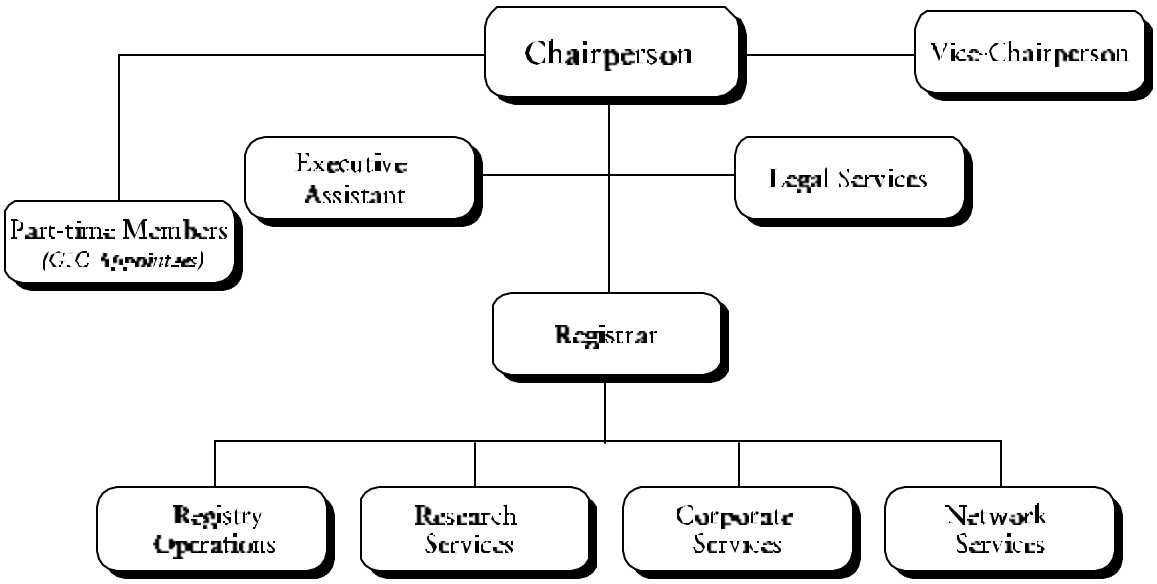
The passage of amendments to the CHRA in 1998 have provided for a more highly qualified Tribunal that is generating a more consistent body of decisions. As discussed later in this report, there has been a greater acceptance of the Tribunal's quasi-judicial interpretation of the CHRA by the reviewing courts as the courts become familiar with the new Tribunal. Eventually, confirmation from the courts will translate into increased certainty for complainants and respondents. The result will be a more timely, fair and equitable disposition of complaints and reduced cost to the justice system.

The Tribunal has made much progress over the last two years. However, it cannot rest on its accomplishments, but must look forward to new challenges and achievements.

The Canadian Human Rights Tribunal is a small, permanent organization, with up to 13 members and a full-time Chairperson and Vice-Chairperson. Both the Chairperson and Vice-Chairperson must have been members of a Canadian bar for at least 10 years, a requirement comparable to that imposed on appointees to the bench under the *Judges Act*. At present, in addition to the full-time positions, 10 part-time members serve on the Tribunal.

All members of the Tribunal are required to have expertise in and sensitivity to human rights issues. In addition, members attend regular meetings for training and briefing sessions on such topics as decision-writing techniques, evidence and procedure, and in-depth analysis of human rights issues. New members appointed to the Tribunal receive intensive training in Ottawa, including attendance at hearings as observers, before being assigned to cases. Throughout their three- or five-year terms, all Tribunal members are given opportunities for ongoing professional development.

The Tribunal's Registry is accountable for the resources allocated by Parliament. It plans and arranges hearings, acts as liaison between the parties and Tribunal members, and provides administrative support.



Organization Chart

Revised Operating Procedures

The Registry regularly monitors the cost and effectiveness of its procedures, making changes and improvements as required. The Tribunal is pleased with the progress made with its revised process and procedures over the past two years and feels confident that Canadians are equally satisfied with the level of service provided to them.

In the past two years, two significant operational changes have been instituted that dramatically improved service and allowed for a more efficient adjudication process. First, the Tribunal introduced new rules of procedure to reduce the time taken to begin the hearing process and to

render decisions. Second, the use of pre-hearing questionnaires has reduced the time it takes for a hearing by one to three months. Questionnaires developed to provide sufficient information to schedule hearings can be completed within two to four weeks. Previously, it took two to three months to arrange conference calls or meetings to obtain the information needed to set hearing dates. Conference calls can still be scheduled if necessary without affecting the hearing and disclosure dates established.

Rules of Procedure

Amendments to the CHRA in June 1998 gave the Tribunal Chairperson the authority to institute rules of procedure governing the conduct of Tribunal hearings. This jurisdiction extends to rules governing notice to parties, summons of witnesses, production and service of documents, pre-hearing conferences and the introduction of evidence.

Since their introduction in 1999, the rules have reduced operational problems related to disclosure and have facilitated the handling of legal and procedural motions. There have been no challenges to the rules, which indicates acceptance by those who use them; however, the Tribunal continually monitors the effects of the rules and adjusts them to provide the best possible service.

The Tribunal has referred to the current rules as “interim” to test their effectiveness before they are officially published in the *Canada Gazette.* Some minor adjustments have been made and members are now confident they meet the needs of all parties involved. On approval from the Regulatory Section of the Department of Justice, the rules will be published in the *Canada Gazette* as required by section 49.9(3) of the CHRA.

Alternative Dispute Resolution

In 1996, the Tribunal launched an alternative dispute resolution (ADR) project that made it possible to resolve complaints without a full hearing.

As indicated in earlier reports, the Tribunal had some concerns about the Tribunal’s role in providing mediation. Not all cases should be mediated: some, because of their nature or complexity, require a full hearing and a comprehensive decision on the issues. Cases that are decided in open public hearings tend to set precedents and produce broad social benefits. Although mediation may serve individual complainants or respondents well, other people in similar situations fail to benefit because the settlement remains confidential. Early in 2000, the Tribunal placed its mediation program on hold pending a complete review of its mediation process. That review has been completed and for the reasons outlined in the next section of this report, the Tribunal has ceased its mediation services.

Tribunal Workload

There has been a dramatic increase in the number of tribunals appointed, from 15 in 1996 to 72 in 2000, with 106 projected for 2001.

In 1996 the Tribunal's responsibilities were expanded to include the adjudication of complaints under the *Employment Equity Act*, which applies to employers with more than 100 employees. Employment Equity Review tribunals are assembled as needed from members of the Tribunal. The first was appointed in February 2000. Since then, three tribunals have been appointed. The sole mandate of Employment Equity Review tribunals is to conduct inquiries into human rights complaints and inquiries under the *Employment Equity Act*.

Table 1 below clearly identifies the most recent challenge facing the Tribunal: the Tribunal is committed to processing cases within one year but faces an unprecedented increase in case load. To date, it has managed to meet its time lines. However, the increase in numbers of cases is relatively recent and a number of cases are still in the system. Thus it may prove more and more difficult to maintain the current level of service.

To address this problem, the Tribunal completed an analysis of its capabilities based on existing resources. Additional resources are required. The Tribunal has now initiated steps to acquire additional financial and human resources. It is confident that if additional resources are approved, Canadians will continue to receive the same level of service as in the past.

Table 1

Tribunals Appointed, 1996–2001

	1996	1997	1998	1999	2000	2001 (Projected)	Totals
Human Rights tribunals appointed	15	23	22	37	70	100	267
Employment Equity tribunals appointed	0	0	0	0	2	6	8
Totals	15	23	22	37	72	106	275

Performance Accomplishments

Table 2

Canadian Human Rights Tribunal	
Planned Spending	$3,527,000.00
Total Authorities	*$3,697,075.00*
2000–2001 Actuals	**$2,871,657.00**

The stated mission of the CHRT is to provide Canadians with a fair and efficient public inquiry process for the enforcement of the *Canadian Human Rights Act* and the *Employment Equity Act*.

The Tribunal has one main activity — to conduct public hearings and render decisions. Its principle goals in carrying out this responsibility are to conduct hearings as expeditiously and fairly as possible, and to render fair and impartial judgements that will stand up to the scrutiny of the parties involved and the courts. In other words, at the end of the day, whatever the result of a particular case, all parties should feel they were treated with respect and fairness.

The Tribunal's Report on Plans and Priorities, issued in March 2000, outlined seven strategic outcomes (formerly planned results) that would demonstrate progress in achieving these goals. This section reports on what we said we would do and what the results have been to date.

1. Provide a timely hearing and decision-making process

In January 1998, the Tribunal pledged to decrease the time to complete a case to 12 months from the date of referral to the release of a decision. While the average time to complete a case in 2000 was 223 days, well within the one-year target, the range of times varied widely. A large number of cases were settled without the need for a hearing. For cases requiring a full hearing and decision, the average time to close a case was 300 days, with almost one-third of these cases requiring in excess of one year to finalize. All cases will not be completed within the year, due to circumstances beyond the Tribunal's direct control, such as delays requested by the parties, Federal Court applications and the complexity of some cases. This will result in moderately higher time lines when those cases are closed. However, improved operating procedures and rules of procedure can help keep these cases to a minimum. The Tribunal will continue to monitor time lines.

Table 3

Time Lines 1995–2000 (Average Days to Complete Cases)

From date of referral from CHRC	1995	1996	1997	1998	1999	2000
Direction to parties	46	22	24	40	15	7
Pre-hearing process	117	95	105	123	73	35
Time for decision to be submitted from close of hearing	137	189	75	103	95	59
Total processing time	417	266	260	251	284	223

Note: The above chart represents the average number of days required to process cases. It shows a general decline in the time required to process and close case files, especially for the initial direction to the parties, which is the one area that is under direct control of the Tribunal.

However, a number of cases referred to CHRT in 2000 are still active, which means the time lines will be moderately higher with the closing of those cases.

The Tribunal's case management process has allowed it to schedule hearings as quickly as the parties are prepared to proceed. Currently, the Tribunal can hold a hearing on any issue within five days, and in some cases within 24 hours, after receiving a referral or a request for motion. However, consultations with clientele have shown that lawyers presenting cases before the Tribunal usually do not become involved in a case until after it is referred to the Tribunal from the CHRC. For the process to be meaningful and effective, parties must be given sufficient time to prepare complete, well-reasoned cases. New procedures incorporating questionnaires have allowed the scheduling process to be completed within four to six weeks after a case is referred from the Commission. It is unrealistic to expect the scheduling process can be improved further, since hearing dates are determined more by the availability of counsel than by the Tribunal. Hearings typically commence within three to five months after referral.

Interventions and procedural challenges are also common and can cause significant delays. For example, one case had been ongoing for three years because of interventions and procedural challenges, including applications to the Federal Court. As a result of a specific challenge to the Federal Court, the case was put on hold for 18 months while the court decided the issue. In the spring of 2000, the court allowed the Tribunal to continue. Again, in the fall of 2000 the Federal Court issued another ruling that forced the Tribunal to suspend all hearings involving private sector respondents. In the spring of 2001, the Federal Court of Appeal overturned this judgement to reactivate the cases. As a result, six to eight months were lost in the planning and conducting of some 25 cases. With these kinds of unplanned delays, it is not realistic to expect that all cases can be completed in a 12-month period. However, based on new operating procedures and some recent rulings from the courts, the Tribunal is cautiously optimistic that it

can achieve this goal for the majority of cases, especially if more full-time members are to be appointed.

The Tribunal generally hears complex cases, often with national implications. Imposing tighter time constraints on such cases might exert undue pressure on the parties involved, thereby denying Canadians natural justice and the right to be heard.

We have not developed a perfect system that will allow for a more expeditious adjudication process. There may not be one. However, we will continue to review our procedures, listen to comments from our clientele and strive for a system that best meets the needs of Canadians.

2. Produce well-reasoned decisions, consistent with the evidence and the law

A review of legal developments over fiscal year 2000–01 prompts three general observations which will be briefly elaborated upon below.

In the wake of the original *Bell Canada* independence challenge of 1997–98, and due in part to the adoption of mediation, the Tribunal experienced a drop in the number of adjudications dealing with the merits of human rights complaints (as opposed to procedural and jurisdictional decision making). In 1999, only four cases were adjudicated. Since 1999, however, the trend has started to reverse: there were five adjudications in 2000 and six in fiscal year 2000–01; at least twelve are projected for fiscal year 2001–02. This is a welcome development, given that adjudication on human rights issues is the main purpose of the Tribunal.

Recent judgements of the Federal Court which reviews the Tribunal's human rights decisions also provide reasons for optimism. Of six judgements issued in 2000–01, all of them essentially upheld the Tribunal's decisions. It is difficult to say if this is a trend or not, given that of the six decisions subject to review, two were from 1995, one was from 1996 and three were from 1998. Nonetheless these results are encouraging. One cause for concern is that, in the judicial review of *HRDC v. Green*, the Federal Court overturned part of a Tribunal remedy on the basis that the CHRA does not allow the Tribunal to order damages as compensation for a successful complainant's legal costs. The Court will re-examine this issue in its judicial review of the legal costs ruling in *Nkwazi v. Corrections Canada*. At stake is the ability of a complainant to obtain independent legal representation (sometimes in the wake of the Commission's withdrawal from the case) with the expectation that, if the complaint is substantiated, legal fees will not erode damages awarded.

As has been noted, pre-emptive procedural and jurisdictional challenges — both before the Tribunal and in the Federal Court — have the capacity to forestall or derail the adjudication of human rights complaints. Such challenges raise concerns, given the public interest in the timely

disposition of complaints and the exhortation in the CHRA that human rights proceedings be conducted as expeditiously and informally as fairness will allow. In this vein, it is encouraging to see that, of eight procedural/jurisdictional challenges decided by the Federal Court in 2000–01, six were dismissed. This judicial trend gives effect to the principle that, barring special circumstances, review of interim rulings is to be discouraged; any objections can be dealt with, if necessary, in reviewing the Tribunal's final decision. While some procedural intervention did occur with respect to the Tribunal's handling of documents subject to Crown privilege, no stays of Tribunal proceedings were granted during fiscal year 2000–01.

3. Bring about changes to policies, regulations and laws made as a result of the Tribunal's decisions

A number of significant changes have occurred in 2000 as a direct result of the Tribunal's work. These include some important issues, notably:

— the Federal Court endorsed a Tribunal decision directing the federal government to adjust its testing policies for language assessment to accommodate those with hearing difficulties;

— the CBC was ordered to provide closed captioning for all of its programming within a specified period;

— Human Resources Development Canada was ordered to cease applying subsection 11(5) of the *Unemployment Insurance Act* to a special category of pregnant women and to allow them access to benefits previously denied; and

— numerous confidential settlements arrived at through mediation indirectly resulted in similar benefits being granted to other Canadians.

4. Develop applications of innovative processes to resolve disputes

This strategic outcome originally related to the provision of mediation services as an alternative to lengthy hearings. As outlined above, in the spring of 2000, the Tribunal suspended its mediation services. It has now completed a review of these services, which showed significant procedural changes would be needed to meet the needs of the parties while maintaining the integrity of the Act. Some changes were clearly beyond the Tribunal's mandate; others would have required additional resources to be approved by Treasury Board or Parliament. Meanwhile, the CHRC instituted similar services using private mediators in lieu of members. Its programme has been as successful as the Tribunal's, measured by the percentage of cases that reach settlement. Consequently, the parties' needs are still being served and financial savings are still being realized. Moreover, the Commission is carrying out a function that is within its

mandate. As a result, the Tribunal has decided not to reinstate its mediation services until the Department of Justice has completed its review of the report by the *Canadian Human Rights Act* Review Panel, *Promoting Equality: A New Vision* (the La Forest Report).

5. Ensure service that is satisfactory to members, the parties involved and the public

As outlined above, the Tribunal completed a study of its mediation services in the past year. Generally, those surveyed found these services adequate, but pointed to some service delivery problems. Ultimately, the Tribunal has discontinued its mediation services.

With respect to our main mandate — conducting fair and impartial hearings — no formal studies or reviews have been conducted. However, informal feedback from clientele indicates Registry Services are meeting the needs of parties.

With regard to the planning and conduct of the hearing process, no complaints have been filed or registered on these activities. The Tribunal strives to be fair to all sides in a dispute and to ensure that they have equal opportunities to be heard throughout the planning of the proceedings and at the hearing itself.

One area in which the Tribunal does receive complaints is in relation to its Web site. Most are concerned with technical problems such as the design of the Web site, difficulty using the search engine, and the unavailability of certain documents or information online. As a small agency, the Tribunal does not have staff with expertise on Web design, but it takes all comments seriously. Accordingly, it plans to engage a consulting firm within the next year to re-evaluate the site and recommend how to improve this service.

6. Improve equality of access

The Tribunal is improving access to its office and information for disabled persons. A teletypewriter (TTY) system is being installed, and a new layperson's guide, together with other documents that explain the Tribunal's operations in plain language, will be available in Braille.

7. Improve public awareness and use of the Tribunal's public documents

Public interest in the Tribunal's Web site has almost doubled from an average of 800 visitors per week in 1998 to 300 visitors per day at present. This success demonstrates the importance the public places upon this service, which allows quick access to decisions and procedural rulings as well as to general information about the Tribunal and public documents such as annual and financial reports. We also received many e-mail inquiries, some in regard to cases and decisions and others to alert us to some technical problems with our site, as discussed above.

The numbers of inquiries and site visitors have alerted us to the need to not only continue this valuable access point but to continue to improve it. To this end, we will work towards dedicating greater resources to site maintenance and to revamp the site to improve its usefulness and ease of access.

Tribunal Decisions

Decisions on the Law of Human Rights

Marinaki v. Human Resources Development Canada June 29, 2000

Ms. Marinaki alleged that her manager had harassed her based on her sex and ethnic origin. The Tribunal found that the confrontations between Ms. Marinaki and her manager arose from the latter's attempts to manage work-related issues, and that neither Ms. Marinaki's sex nor her ethnicity played any role in the conflict. While the manager's conduct during various confrontations was inappropriate, abusive, unprofessional and constituted poor management, it was not based on a prohibited ground of discrimination. Neither Ms. Marinaki's sex nor her ethnic origin was a factor in her manager's treatment of her.

Oster v. International Longshoremen's and Warehousemen's Union August 9, 2000

Ms. Oster alleged that the respondent union had refused to send her to work as a cook/deckhand on a vessel on the basis of her sex. The Tribunal found that she had been discouraged from applying for the job in question because the vessel did not have separate sleeping accommodations for women. In the circumstances, however, there was no evidence that having a woman on board would force the other employees to accept sleeping accommodations with members of the opposite sex as a condition of employment; the shift schedule was such that Oster and her crew mates would not be using the sleeping quarters at the same time. In the absence of evidence of undue hardship, the complaint was upheld. However, given Ms. Oster's lack of experience, no lost wages were awarded, since she would not have obtained the job in any event.

Wachal v. Manitoba Pool Elevators September 27, 2000

Ms. Wachal was dismissed due to excessive absenteeism. She claimed that her absences were due to allergic and asthmatic reactions caused by renovations to the offices where she worked. Her complaint alleged discrimination on the basis of disability and a failure to accommodate her disability. However, the Tribunal did not find on the evidence that Ms. Wachal's absences were due to her disability. In particular, the Tribunal noted that there was no evidence that any of her co-workers had noticed her symptoms while she was at work. Furthermore, the medical certificates provided did not specifically indicate the nature of Ms. Wachal's illness. Finally, Ms. Wachal's absences generally fell at the end of each month when the office work load was at its highest. The Tribunal dismissed the complaint.

Vlug v. Canadian Broadcasting Corporation November 15, 2000

Mr. Vlug alleged that the CBC discriminated against him on the grounds of disability because it did not provide full captioning for the hearing impaired in its Newsworld and English-language network programming. The Tribunal acknowledged that the CBC was an organization under considerable financial stress, and that it had made significant progress in expanding its captioning. However, the CBC's explanations as to why full captioning was not possible were simply not credible. In particular, the CBC did not fully consider: (1) the amount of revenues to be realized from captioning sponsorships; (2) the possibility of requesting commercials for CBC programmes already captioned; and (3) the true cost of having centralized real-time captionists on stand-by for use by affiliated stations. The CBC has sought judicial review of this decision in the Federal Court**.**

Nkwazi v. Correctional Service Canada February 5, 2001

Ms. Nkwazi worked as a casual nurse in a regional psychiatric centre operated by Corrections Canada. The Tribunal found that a manager had advised Ms. Nkwazi to stay away from work to fulfill a non-existent "rest period" requirement in an effort to exclude her from participating in a staffing competition. The same manager had stated that Ms. Nkwazi's name was the cause of difficulties associated with providing her access to the centre's internal e-mail system. When Ms. Nkwazi complained about these actions, the centre decided not to renew her contract and took other retaliatory measures. The Tribunal concluded that management's actions with regard to the competition and the e-mail system were motivated by Ms. Nkwazi's race or colour; later events (while not discriminatory *per se*) flowed from these incidents. It ordered reinstatement of Ms. Nkwazi, reimbursement for lost wages and the issuance of an apology to her. It also ordered damages for hurt feelings and for wilful or reckless conduct.
In a related ruling dated March 29, 2001, the Tribunal ordered that Ms. Nkwazi's legal costs be reimbursed.

McAllister-Windsor v. Human Resources Development Canada March 9, 2001

The complainant's permanent medical condition (incompetent cervix) required her to stop working early in her pregnancy. She therefore used sickness benefits under the *Unemployment Insurance Act*. Once her child was born, the complainant received maternity benefits, but was denied parental benefits. The Tribunal found that by imposing a 30-week cap on all "special benefits" (sickness benefits, maternity benefits and parental benefits), the *Unemployment Insurance Act* discriminated against the complainant on the grounds of sex and disability. The only people who had their access to special benefits limited by the operation of the cap were pregnant women who had claimed sickness benefits and, in the complainant's case, her use of sickness benefits was due to her disability. This was unjustifiable, given the Employment Insurance fund's current surplus of around $29 billion. The department was ordered to cease

applying the discriminatory provision, but the order was suspended for a year to permit consultation and legislative reform.

Popaleni and Janssen v. Human Resources Development Canada March 9, 2001

The *Employment Insurance Act* (formerly the *Unemployment Insurance Act*) stipulates that a claimant may combine regular benefits (for lay-off etc.) with special benefits (for sickness leave/maternity leave/parental leave). However, there are restrictions: (1) where the regular benefit entitlement is longer than 30 weeks, the combined benefit entitlement cannot exceed the regular benefit entitlement; (2) where the regular benefit entitlement is 30 weeks or less, the combined benefit entitlement cannot exceed 30 weeks. The complainants claimed that this provision discriminated against them on the grounds of sex, and Ms. Popaleni also alleged family status discrimination. The Tribunal dismissed the complaints. It found that the complainants suffered the same consequences as male claimants who were entitled to both regular benefits and sickness/parental benefits. Similarly the legislation had the same effect on Ms. Popaleni as it did on any "non-parent" claimant who became ill and combined regular benefits with sickness benefits.

Table 4

Number of Cases Referred, 1993–2000

1993	1994	1995	1996	1997	1998	1999	2000
31	35	26	15	23	16	37	70

Note: The number of cases before the Canadian Human Rights Tribunal depends entirely on how many cases are referred by the Canadian Human Rights Commission. The reduction in cases from 1996 to 1998 was the result of changes to the CHRC's case referral process and the Federal Court decision by Justice McGillis in *CTEA et al.* v. *Bell Canada*, which temporarily prevented the Tribunal from taking on new cases. There appears to be a new pattern commencing in 1999 of CHRC sending more cases to the Tribunal.

Judicial Review in the Federal Court — Selected Cases

Green v. Treasury Board, Public Service Commission and Human Resources Development June 2, 2000 FCTD (Lemieux J.)

The Tribunal had found that the Treasury Board discriminated against Ms. Green on the basis of disability when it tested her potential for learning a second language, and — based on the test results — subsequently denied her access to French-language training. In the Tribunal's view, the testing methods unfairly evaluated Ms. Green's capabilities by focussing on limitations imposed by her auditory dyslexia, but ignoring compensatory strategies that she could use in an adapted learning setting.

The Court upheld the Tribunal's finding that ostensibly non-discriminatory tests applied to the general Public Service population had discriminatory adverse consequences on people with Ms. Green's disability. It also upheld the Tribunal's conclusion that the Treasury Board and Public Service Commission had not fulfilled their obligation to accommodate Ms. Green's disability. The Court agreed with the Tribunal that a new method for evaluating potential for learning a second language should be developed, and that Ms. Green should be promoted to the level she would have reached but for the discrimination. However, the Court set aside the Tribunal's award of compound interest on monetary damages and its award of legal costs to Ms. Green.

Cramm v. Canadian National Railway June 16, 2000 FCTD (Mackay J.)

When the Railway shut down in Newfoundland, Mr. Cramm's benefits were set out in a collective agreement which provided income maintenance benefits to those who had accumulated 96 months of service. In a given year, employees were allowed to include in their eligible service calculation certain absences of up to 100 days, provided they worked at least one day in that year. Because of an injury sustained on the job, Mr. Cramm was absent from the workplace for four years, which prevented him from accumulating the requisite 96 months for income maintenance. He alleged that the agreement was discriminatory and while the Tribunal upheld his complaint, the Review Tribunal dismissed it. The Review Tribunal found that the agreement treated Mr. Cramm no differently than any other employees who had lengthy absences.

In the Court's view, the Review Tribunal properly found that Mr. Cramm had not been treated any differently than any other individual or group who was absent for the same time as he for reasons set out in the agreement (*eg.* jury duty, injury, maternity leave *etc.*).

MacNutt v. Shubenacadie Indian Band May 24, 2000 FCA (Stone/Isaac/Sexton JJ.A.)

In this case, an Indian band had denied social assistance benefits to non-Aboriginal residents of the reserve. The Tribunal found that this constituted discrimination and had ordered that the band make these benefits available to the individuals in question. The Federal Court Trial Division upheld the Tribunal's decision.

The Court of Appeal also upheld the Tribunal's decision, and refused to accept the band's constitutional arguments. In particular, the Court noted that the band could not invoke interpretive provisions of the *Charter of Rights and Freedoms* to contest the Tribunal's ruling, since the complainants themselves had not relied on the equality provisions of the Charter. Finally, the Court held that the fact that social assistance programs are usually administered by the provinces was not enough to remove the matter from federal jurisdiction, since Parliament has the constitutional authority to legislate with regard to Aboriginal persons.

Bell Canada v. C.T.E.A., C.E.P., Femmes-action and C.H.R.C. November 2, 2000 FCTD (Tremblay-Lamer J.), reversed: May 24, 2001 FCA (Stone/Létourneau/Rothstein JJ.A.)

Bell Canada was the respondent in an equal pay complaint before the Tribunal. Bell challenged the Tribunal's jurisdiction to hear the case on the grounds that the Tribunal did not possess the requisite institutional independence and impartiality. In particular, two deficiencies in the CHRA were identified: (1) the Tribunal is bound by guidelines issued by the CHRC, a litigant before the Tribunal, and (2) members of the Tribunal whose terms expire cannot complete their outstanding cases without the approval of the Chairperson. The Tribunal dismissed Bell's arguments, ruling that these features of the legislation did not undermine the Tribunal's independence and impartiality.

On judicial review, the Federal Court Trial Division disagreed. It found that the Tribunal did not appear impartial, given the Commission's power to pass guidelines dictating how the Tribunal was to interpret the Act. Furthermore, it appeared that members who were ultimately dependent on the Chairperson's approval for the extension of their terms could not be expected to decide cases independently.

On appeal, however, the Federal Court of Appeal reversed the decision of the Trial Division. The Court noted first, as general considerations, that the Tribunal did not wield punitive powers, that no constitutional challenge had been made to the statute and that any guidelines passed by the Commission were subject to Parliamentary scrutiny. It then found that the statutory changes of 1998 no longer rendered the guidelines binding on the Tribunal in a 'particular case' but only in a 'class of cases,' which has a general application, less likely to give rise to a reasonable apprehension of institutional bias. As for the argument that the powers of the Commission were problematic in that its quasi-prosecutorial role and its role in setting guidelines overlapped, the Court found that these functions were exercised separately and apart from one another, alleviating any implications of bias.

With respect to the power of the Chairperson to extend the term of any member of the Tribunal whose appointment had expired during an inquiry until that inquiry had concluded, the Court found that this power was not fatal to the institutional independence of the Tribunal. It noted that the Chairperson herself cannot be capriciously removed from office because of decisions made by her in the administration and operation of the Tribunal. Additionally, if the Chairperson abuses her power in extending or refusing to extend the appointment of a Tribunal member for reasons wholly extraneous to the proper administration of the Tribunal, her decision would be reviewable pursuant to section 18.1 of the *Federal Court Act*. Finally, the Court reiterated that the Tribunal's powers are remedial, not punitive, and thus the requirements of fairness are less stringent.

Bell Canada sought leave to appeal to the Supreme Court of Canada on August 20, 2001.

Table 5

Judicial Review of Tribunal Decisions, 1997–2000*

	1997	1998	1999	2000	Total
Cases referred to the Tribunal	23	22	37	70	152
Decisions rendered†	9	8	4	6	27
Decisions challenged					
• **upheld**	1	6	0	0	7
• **overturned**	0	0	0	0	0
• **withdrawn**	3	2	0	0	5
• **still pending**	0	0	1	3	4
• **total**	4	8	1	3	16

* *As discussed elsewhere in this report, the courts are more frequently endorsing the work of the Tribunal.*

† *The cases included in this entry are those for which the Tribunal wrote and submitted a final judgement. They do not include complaints that were withdrawn or settled by mediation.*

Pay Equity Tribunal Hearings

Pay equity cases occupy a large share of the Tribunal's total hearing days. This continued despite the adjournment of two of the cases as a result of Bell Canada's challenge before the Federal Court.

The longest-running Tribunal case still in hearings is *Public Service Alliance of Canada (PSAC) v. Canada Post,* which has heard 348 days' worth of evidence and arguments since 1992. In 1999, the complainants rested their case and the respondents began presenting. However, the proceedings were adjourned in November 2000 as a result of the Federal Court Trial Division decision in the Bell Canada case, leaving a total of 19 hearing days for the year. It is expected that reply evidence will commence by the end of 2001, followed by final arguments.

Requests for judicial review of preliminary procedural or jurisdictional matters for pay equity cases are common and 2000 was no exception. Most notable was Bell Canada's challenge of the Tribunal's jurisdiction to hear the case in *Canadian Telephone Employees' Association*

(CTEA), Communications Energy and Paperworkers Union of Canada and Femmes-Action v. Bell Canada. Previously, Bell's Federal Court application challenging the adequacy of the Commission's investigation into the complaint had been granted, quashing the referral of the case to the Tribunal. In November 1998, the Federal Court of Appeal reversed the lower court's decision and referred the case back to the Tribunal. In 2000, 38 hearing days took place before the Federal Court Trial Division decision in November (please see page 17) caused the proceedings to be further delayed. Now that the Federal Court of Appeal has reversed the Trial Division's decision, this case is scheduled to recommence in the fall of 2001.

A third wage discrimination case, *Public Service Alliance of Canada (PSAC) v. Government of the Northwest Territories*, began hearings on preliminary motions in 1998. Since the case's referral to the Tribunal in 1997, many motions have been brought by the parties on preliminary procedural and jurisdictional matters, and there have been several requests for judicial review of the Tribunal's rulings on those motions. The hearings in this case were not directly affected by the Bell Canada challenge and thus continued for 47 days during 2000. It was expected that the PSAC and the complainant would close their cases in early 2001, at which point the hearings would stop until the Federal Court of Appeal ruled on the Bell Canada case. As their cases were not closed, the hearings continued and have been scheduled for the remainder of 2001.

These high-profile cases underscore the challenges inherent in building a new body of case law. Because pay equity case law is still in its infancy and because the stakes are so high, many of these cases will likely take years to resolve, with obvious implications for the Tribunal's workload.

Annex 1: Financial Performance

The Tribunal spent less than it was allotted in 2000–01. The total lapsed funding for the Tribunal in fiscal year 2000–01 was approximately $825,000.

Firstly, funding for pay equity cases lapsed. The Federal Court judgement in November 2000 interrupted the hearings, with the result that spending on two of these cases immediately came to an end for the remainder of the fiscal year. As a condition of its approval of funding for the pay equity cases, Treasury Board had stipulated that funding be used only in support of those individual cases.

Secondly, there was a funding lapse in the Tribunal's main reference levels. Again, this was partially a result of the Federal Court judgement, where complaints against private sector employers were placed in abeyance for the remainder of the fiscal year. Cases involving public sector respondents were allowed to proceed.

Prudent planning by management has also had a positive effect on Tribunal spending. In 2000–01, 70.3 percent of the Tribunal's operating funds were spent on hearings, while 17.3 percent of funds were allocated to corporate services and 9.5 percent to the registrar (executive and legal). Information technology accounted for 3.8 percent of the total.

Financial Summary Tables

The following tables apply to the Tribunal:

1. Summary of Voted Appropriations

2. Comparison of Total Planned Spending to Actual Spending

3. Historical Comparison of Total Planned Spending to Actual Spending

Financial Table 1

Financial Requirements by Authority (in millions of dollars)				
		2000–01		
Vote		Planned Spending	Total Authorities	Actual
Canadian Human Rights Tribunal				
30	Operating expenditures	3.4	3.6	2.8
(S)	Contributions to employee benefits	0.1	0.1	0.1
Total Department		3.5	3.7	2.9

Total Authorities are Main Estimates plus Supplementary Estimates plus other authorities.

Financial Table 2

Departmental Planned versus Actual Spending (in millions of dollars)			
	2000–01		
Business Lines	Planned	Total Authorities	Actual
Canadian Human Rights Tribunal			
FTEs	17	17	17
Operating	3.5	3.7	2.9
Capital	—	—	—
Voted Grants and Contributions	—	—	—
Subtotal: Gross Voted Expenditures	3.5	3.7	2.9
Statutory Grants and Contributions	—	—	—
Total Gross Expenditures	3.5	3.7	2.9
Less:			
Respendable Revenues	—	—	—
Total Net Expenditures	3.5	3.7	2.9
Other Revenues and Expenditures			
Non-respendable Revenues	(—)	(—)	(—)
Cost of services provided by other departments	0.5	0.5	0.6
Net Cost of the Program	4.0	4.2	3.5

Financial Table 3

Historical Comparison of Departmental Planned versus Actual Spending (in millions of dollars)

			2000–01		
	Actual 1998–99	Actual 1999–00	Planned Spending	Total Authorities	Actual
Canadian Human Rights Tribunal	2.2	3.9	3.5	3.7	2.9
Total	2.2	3.9	3.5	3.7	2.9

Total Authorities are Main Estimates plus Supplementary Estimates plus other authorities.

Note: Special one-time funding approvals were provided to the Tribunal for the implementation of Bill S-5 in 1999–00.

Annex 2: Other Information

Contacts for Further Information and Web Site

Michael Glynn, Registrar
Canadian Human Rights Tribunal
473 Albert Street
Suite 900
Ottawa, Ontario
K1A 1J4

Tel: (613) 995-1707
Fax: (613) 995-3484

e-mail: registrar@chrt-tcdp.gc.ca
Web site: www.chrt-tcdp.gc.ca

Legislation and Associated Regulations Administered

The appropriate Minister is responsible to Parliament for the following Acts:

Canadian Human Rights Act (R.S. 1985, CH–6, amended)
Employment Equity Act (Bill C–64, given assent on December 15, 1995)

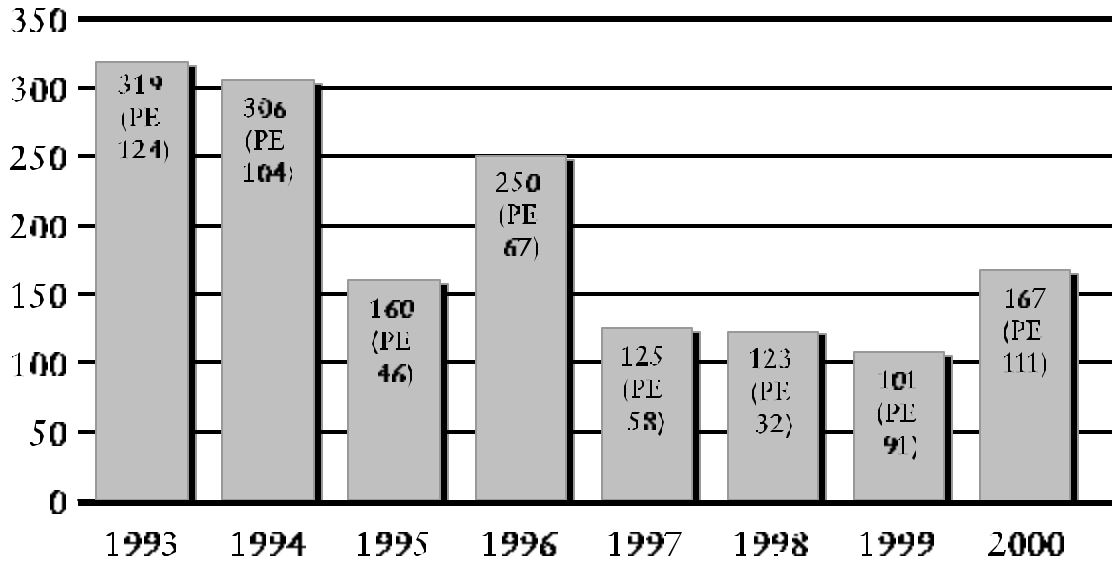
Statutory Annual Reports and Other Departmental Reports

The following documents can be found on the Tribunal's Web site:

Annual Report (1998, 1999 and 2000)
Report on Plans and Priorities (2001–2002 Estimates)
Rules of Procedure

Overview Statistics

Figure 1. Number of Hearing Days per Year



Note: "PE" represents pay equity cases and includes *PSAC* v. *Treasury Board*, *PSAC* v. *Canada Post Corporation*, *CTEA et al.* v. *Bell Canada* and *PSAC* v. *Government of the Northwest Territories*.

Figure 2. Average Cost per Case by Ground

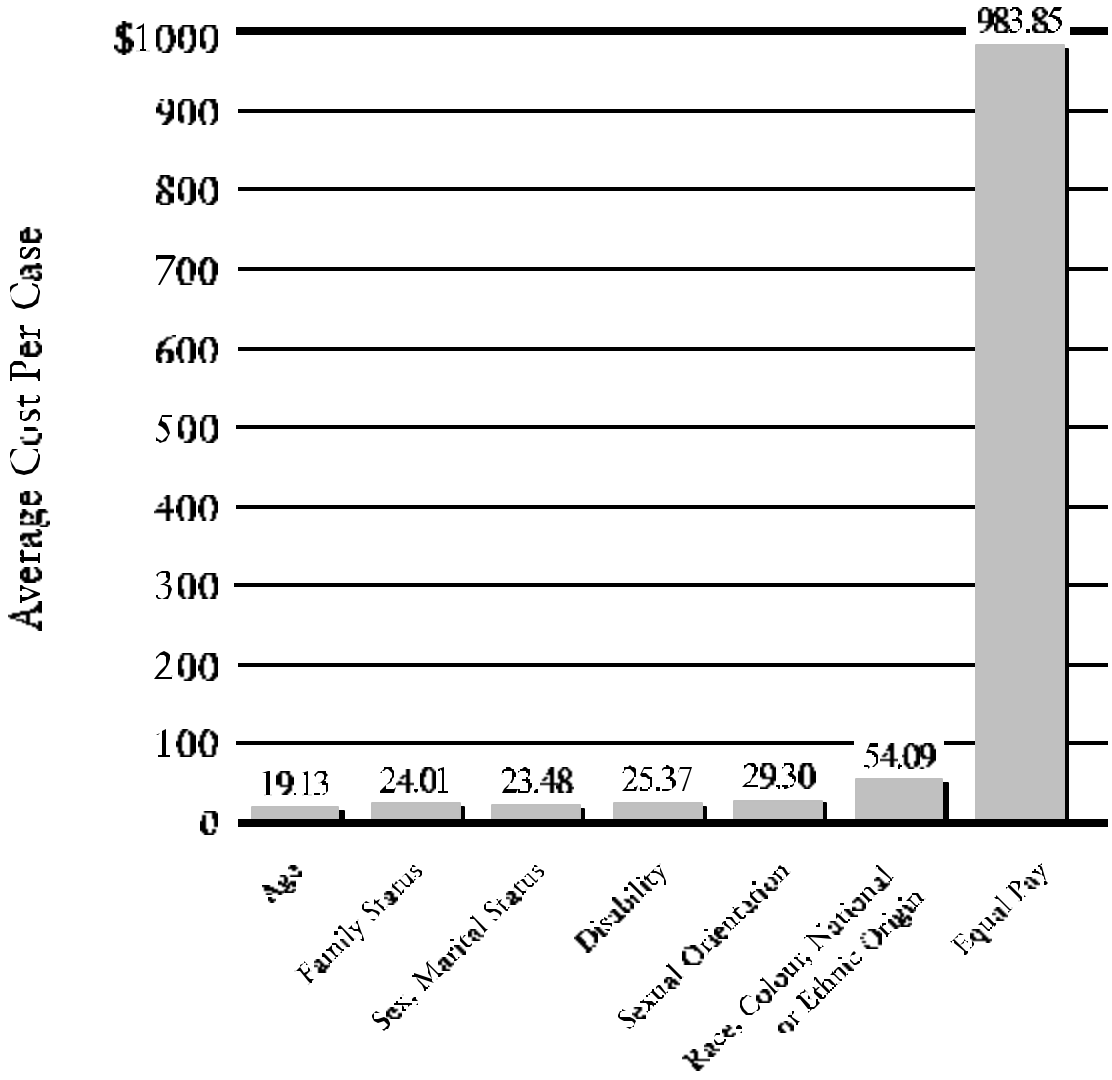


Figure 3. Average Number of Days per Case by Ground